

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY S. BUNN

Claimant

v.

MERCY HEALTH SYSTEM OF KANSAS, INC.

Self-Insured Respondent

)
)
)
)
)
)

Docket No. 1,052,298

ORDER

Both parties requested review of Administrative Law Judge Brad Avery's August 21, 2013 Award. The Board heard oral argument on December 10, 2013.

APPEARANCES

Kala A. Spigarelli, of Pittsburg, Kansas, appeared for the claimant. Joseph R. Ebbert, of Kansas City, Missouri, appeared for self-insured respondent.

RECORD AND STIPULATIONS

The Board has considered the record and adopted stipulations listed in the Award. Claimant, at oral argument, made it clear she is not alleging her T12 compression fracture is compensable under workers compensation.

ISSUES

The Award indicated claimant's hip injury, which resulted in a 15% impairment to the body as a whole, arose out of and in the course of her employment as stemming from a neutral risk, a fall of unknown origin. The Award indicated there was insufficient evidence to prove claimant's low back injury was caused by her fall or was the natural and probable consequence thereof. Respondent was ordered to pay all valid and authorized medical expenses related to the claim, including the cost of building ramps at claimant's home and her daughter's home to accommodate claimant's physical condition.

Claimant argues she sustained a 10% low back impairment due to an altered gait. Claimant further argues all unpaid bills should be paid and out-of-pocket expenses, including two ramps, be reimbursed by respondent as authorized medical treatment. Claimant requests the Board modify the Award to find her back injury compensable.

Respondent argues claimant's accident did not arise out of and in the course of her employment. Respondent asserts claimant's preexisting multiple sclerosis likely played a role in her balance and contributed to the incident in question. Respondent asks the Board to reverse the Award.

The issues for the Board's review are:

- 1) Did claimant's injury arise out of and in the course of her employment?
- 2) What is the nature and extent of claimant's disability?
- 3) Should all unpaid bills and out-of-pocket expenses, including two ramps, be paid by respondent as authorized medical treatment?

FINDINGS OF FACT

Claimant works for respondent as an administrative assistant. She was injured on June 25, 2010. She had gotten up to put some mail in an out box when the telephone rang. She turned around and was headed back to her desk when she fell, landing on her left side and suffering a broken hip. Claimant testified she had not been having any problems with her left hip before she fell. When asked what caused her to fall, she stated, "I really don't remember. I just remember hitting the floor."¹ While unsure about what caused her to fall, claimant indicated it could possibly have been a seam in the carpet, a sharp edge on her desk, or a combination of the two. Claimant believed her hip broke after the fall because she was having no pain beforehand.

Claimant denied previous significant back problems. She saw a chiropractor in 2009 a couple of times, but was not a regular patient and went mostly for neck and bilateral shoulder problems. Claimant had a meniscectomy of her right knee in 2004 and her right knee replaced in 2008. She denied problems with her right knee subsequent to the 2008 surgery. She had a left knee MRI in November 2009 and was diagnosed with degenerative joint disease, as well as a meniscus tear, which was not repaired. Claimant acknowledged she had left foot pain in the fall of 2009.

Claimant was also diagnosed with multiple sclerosis in 1992. She testified that prior to her accident, she had never been treated for multiple sclerosis and denied such disease impacted her ability to walk or caused her problems or limitations.

After claimant's accident, she was taken to her personal physician, Robert R. Nichols M.D., and admitted to the hospital. X-rays revealed a left hip fracture. Terry D. Schwab, M.D., an orthopedic surgeon, performed a bipolar hip replacement arthroplasty the next day. She gradually worked more hours. After several weeks, she went back to her regular job on a full-time basis. Following surgery, claimant walked with a cane. She testified she developed an altered gait because her left leg was shorter than her right. Claimant continues to use a cane for walking.

¹ P.H. Trans. at 8.

After her initial admission to the hospital, claimant was referred to Dr. Schwab. Dr. Schwab's June 26, 2010 report noted claimant had "a history of multiple sclerosis. Her multiple sclerosis causes a little bit of left sided weakness but other than that she is doing well with her multiple sclerosis."² Claimant did not recall telling Dr. Schwab that her multiple sclerosis was causing left-sided weakness.

On November 9, 2011, claimant was seen at the request of her attorney by Edward Prostic, M.D., an orthopedic surgeon. Dr. Prostic opined "the injury in the fall and the subsequent abnormality of gait and body mechanics was sufficient to aggravate the preexisting disease at L5-S1 and cause her radiculopathy."³ While Dr. Prostic did not know what happened to cause claimant's hip fracture, he indicated there have been studies of older ladies which showed a fracture can occur from either a twist or impact with the ground. Dr. Prostic believed the fall most likely caused the hip fracture. Dr. Prostic did not give any consideration to claimant's multiple sclerosis condition.

Dr. Prostic assigned a 24% rating to the body as a whole which consisted of 15% for the bipolar hip replacement arthroplasty and 10% for the lumbar radiculopathy pursuant to the AMA *Guides*⁴ (hereafter *Guides*).

Dr. Schwab next saw claimant on June 4, 2012 for low back complaints. Such treatment was provided pursuant to an Order by Judge Avery from a preliminary hearing on February 24, 2012, and affirmed by a single Board Member on May 3, 2012. Dr. Schwab indicated this was the first time claimant had ever complained of back pain.

On May 6, 2013, claimant was evaluated at respondent's request by David Clymer, M.D., an orthopedic surgeon. Dr. Clymer indicated claimant denied knowing what caused her fall, denied any balance problem or condition that may have caused the fall, and denied any pain or instability that may have caused her to fall. "She simply felt that she fell, landed on the floor, and then had hip pain."⁵ Dr. Clymer testified it is difficult to determine when the fracture occurred, but a spontaneous fracture before a fall would most likely occur from a weakened bone as a result of osteoporosis, a stress fracture or a tumor.⁶ While Dr. Clymer believed claimant had some preexisting conditions that put her at a greater risk for osteoporosis, he found no documentation supporting those factors. Dr.

² Schwab Depo., Resp. Ex. B at 8.

³ Prostic Depo. at 10.

⁴ American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁵ Clymer Depo. at 9-10.

⁶ Drs. Prostic and Brian Ipsen, M.D., also noted osteoporosis is a risk factor for fractures.

Clymer indicated claimant never mentioned a history of multiple sclerosis, but if she was experiencing left-sided weakness, it could have been a factor in her fall. His report stated, "[I]t appears that Ms. Bunn injured her left hip as a result of the fall at work on 6/25/2010 causing a femoral neck fracture. Based upon her history, it appears that there was no particular precipitating cause with regard to the fall at work."⁷

Dr. Clymer did not believe a simple gait change would result in permanent impairment of the back unless it involved a dramatic leg length inequality or a marked deformity. Dr. Clymer's examination revealed an objectively normal gait pattern and some mild stiffness in claimant's low back, but no localized tenderness. Dr. Clymer opined claimant did not suffer any impairment as a result of her altered gait.

Dr. Clymer assigned a 37% rating to the left lower extremity at the level of the hip which converts to a 15% whole body impairment pursuant to the *Guides*.

Dr. Nichols testified on July 13, 2013. Dr. Nichols was aware claimant had multiple sclerosis at the time of her accident and was being treated by a neurologist. Dr. Nichols testified there is no way to know whether claimant's hip fracture occurred before the fall or as a result of the fall. When questioned whether he believed the multiple sclerosis could have contributed or caused claimant to fall, Dr. Nichols testified:

. . . I mean through the course of her multiple sclerosis, as people do with that illness, she had become more weak, more unstable, balance issues, so if you are going to ask me exactly where she was at this point, I can tell you that she - - it is my recollection that she was at a point where that certainly could have impacted her balance and made her more likely to fall.⁸

While Dr. Nichols testified claimant's multiple sclerosis "could" certainly have something to do with her fall, he could not say her multiple sclerosis caused her to trip and fall.⁹

Dr. Schwab testified on July 22, 2013. Dr. Schwab testified there is no way of knowing whether claimant's hip broke before or after the fall, but most hip fractures occur as a result of a fall. It was Dr. Schwab's opinion that claimant did not experience a spontaneous hip fracture prior to her fall. Dr. Schwab believed claimant's left leg weakness may have resulted in her left leg giving out and causing her to fall.

⁷ Clymer Depo., Ex. 2 at 3.

⁸ Nichols Depo. at 11.

⁹ *Id.* at. 17-19.

Dr. Schwab believed it is fairly common for someone to have an abnormal gait after hip surgery which can lead to low back problems. While Dr. Schwab agreed claimant could have developed back pain as a result of an altered gait, he could not say her back pain was the result of an altered gait. It was Dr. Schwab's opinion that claimant's low back problems most likely "did not occur as a result of her fall" ¹⁰ If her problems predated the fall, Dr. Schwab did not believe the fall aggravated her low back condition.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.¹¹ Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.¹²

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.¹³

¹⁰ Schwab Depo. at 40.

¹¹ K.S.A. 2009 Supp. 44-501(a).

¹² *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

¹³ *Id.* at 278.

The Kansas Supreme Court, in *Hensley*,¹⁴ categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the worker; and (3) neutral risks with no particular employment or personal character. Neutral risks are compensable under workers compensation.¹⁵

K.S.A. 2009 Supp. 44-510h(a) states:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . , as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

ANALYSIS

Claimant's unexplained fall is compensable based on *McCready*. While various doctors testified claimant's personal health issues, such as weakness and balance concerns arising from multiple sclerosis, prior knee problems and osteoporosis that could have caused a spontaneous hip fracture, might have been factors in the accident, such possibilities fall short of the "more probably true than not true" burden of proof. Possibilities are not necessarily probabilities. Claimant carried her burden of proof.

For the reasons set forth in the judge's Award, the Board affirms the nature and extent of claimant's permanent impairment.

Regarding the medical bills, respondent is ordered to pay the bills identified as Exhibit 1 from the regular hearing, but not the bills incurred in 2012. Respondent is not responsible for payment of medical bills relating to claimant's low back or T12 compression fracture. The parties agreed to this arrangement at oral argument. Of course, payment for such bills is limited to allowances in the Kansas Medical Fee Schedule.

The Board affirms the judge's Award concerning respondent paying for the ramps.

AWARD

Having reviewed the entire evidentiary file contained herein, the Board affirms the August 21, 2013 Award concerning compensability, the nature and extent of disability and respondent's responsibility to pay for the ramps. The Board modifies the Award by finding respondent must pay the bills in Exhibit 1 from the regular hearing, subject to the Kansas Medical Fee Schedule, but not for 2012 bills or any bills relating to claimant's low back or T12 compression fracture.

¹⁴ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979); see also *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

¹⁵ *McCready*, 41 Kan. App. 2d at 92-93.

WHEREFORE, it is the finding, decision and order of the Board that the August 21, 2013 Award is affirmed regarding the nature and extent of claimant's disability and respondent's obligation to pay for the ramps, but modified regarding payment of medical bills, as listed above.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Kala A. Spigarelli
kspig@spigarelli-law.com
lori@spigarelli-law.com

Joseph R. Ebbert
jebbert@fwpclaw.com
esmiley@fwpclaw.com

Honorable Brad Avery